(9)

Supreme Court, U.S.
FILED
AUG 9 1995
OFFICE OF THE CLERK

No. 94-1654

In The

Supreme Court of the United States

October Term, 1995

GLEN HEISER and GEORGE SPENCER,

Petitioners,

vs.

KEEN A. UMBEHR,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF OF PETITIONERS

*DONALD PATTERSON
STEVE R. FABERT
FISHER, PATTERSON, SAYLER & SMITH, L.L.P.
534 S. Kansas Avenue, Suite 400
P.O. Box 949
Topeka, Kansas 66601-0949
(913) 232-7761
Attorneys for Petitioners
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

45 pp

QUESTIONS PRESENTED FOR REVIEW

1. The remedies articulated by this Court in *Pickering v. Board of Education of Township High School District*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) and its progeny should not be extended and amplified to protect the economic rights of government contractors whose services are terminable at will.

2. The tests of *Pickering* and its progeny must be reformulated or redescribed to fit the circumstances of an independent contractor, if the rule of *Pickering* is to be extended.

3. If independent contractors are to be given the same protections as employees under *Pickering*, at least the affirmative defenses now available to employers must remain available to the contracting agency.

LIST OF PARTIES

The parties to the proceedings are:

Petitioners:

GLEN HEISER and GEORGE SPENCER, in their official capacities as members of the Board of County Commissioners of Wabaunsee County, Kansas.

Respondent:

KEEN A. UMBEHR.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 8

ARGUMENT 11

1. The remedies articulated by this Court in *Pickering v. Board of Education of Township High School District*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) and its progeny should not be extended and amplified to protect the economic rights of government contractors whose services are terminable at will. 11

   A Review of Prior Decisions 12

   Independent Contractor vs. Employee 17

   A *Per Se* Rule for Independent Contractors 23

2. The tests of *Pickering* and its progeny must be reformulated or redescribed to fit the circumstances of an independent contractor, if the rule of *Pickering* is to be extended 26

3. If independent contractors are to be given the same protections as employees under *Pickering*, at least the affirmative defenses now available to employers must remain available to the contracting agency 32

CONCLUSION 36

TABLE OF AUTHORITIES

Page

CASES:

Alexander v. United States, 509 U.S. ___, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993) 17

Arcara v. Cloud Books, Inc., 478 U.S. 697, 106 S.Ct. 3172, 92 L.Ed.2d 568 (1986) 16

Branti v. Finkel, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980) 13

Bush v. Lucas, 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983) 34

Civil Service Commission v. Letter Carriers, 413 U.S. 548, 546, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973) 13

Cohen v. Cowles Media Co., 501 U.S. 663, 111 S.Ct. 2513, 115 L.Ed.2d 586 (1991) 17

Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) 13, 15, 32

Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673, 9 L.Ed.2d 547 (1976) 13, 33, 34

Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990) 17

F.T.C. v. Superior Court Trial Lawyers Association, 493 U.S. 411, 110 S.Ct. 768, 107 L.Ed.2d 851 (1990) 17

Harlow v. Fitzgerald, 457 U.S. 800, 73 L.Ed.2d 396, 102 S.Ct. 2727 (1982) 29

Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 59 L.Ed.2d 401, 99 S.Ct. 1171 (1979) 25

TABLE OF AUTHORITIES – Continued

Page

McKennon v. Nashville Banner Publishing Company, ___U.S.___, 115 S.Ct. 879, 130 L.Ed.2d 852 (1995) 33

Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977) 13, 17, 33

Pickering v. Board of Education of Township High School District, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) ..... *passim*

Public Workers v. Mitchell, 330 U.S. 75, 97 S.Ct. 556, 91 L.Ed. 754 (1947) 14

Rutan v. Republican Party of Illinois, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990) 13, 14, 15

State ex rel. Stephan v. Board of Sedgwick County Commissioners, 770 P.2d 455, 244 Kan. 536 (1989) 25

Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 64 L.Ed.2d 641, 100 S.Ct. 1967 (1980) 25

Tenney v. Brandhove, 341 U.S. 367, 95 L.Ed. 1019, 71 S.Ct. 783 (1951) 25

Turner Broadcasting System v. F.C.C., 512 U.S. ___, 114 S.Ct. 2445, 129 L.Ed.2d 497 27

U.S. Term Limits, Inc. v. Thornton, ___U.S.___, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995) 24

Umbehr v. Board of Wabaunsee County Commissioners, 825 P.2d 1160, 16 Kan.App.2d 512 (1992) 1, 5

Umbehr v. Board of Wabaunsee County Commissioners, 843 P.2d 176, 252 Kan. 30 (1992) 1, 5

Umbehr v. McClure, et al., 44 F.3d 876 (10th Cir. 1995) 1

TABLE OF AUTHORITIES – Continued

Page

Umbehr v. McClure, et al., 840 F.Supp. 837 (D.Kan. 1993) 1

United States v. Albertini, 472 U.S. 675, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985) 16

United States v. National Treasury Employees Union, ___ U.S. ___, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995) 13, 14

Ward v. Rock Against Racism, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) 16

Waters v. Churchill, 511 U.S. ___, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994) 13, 34

Wayte v. United States, 470 U.S. 598, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985) 16

UNITED STATES CONSTITUTION:

First Amendment ..... *passim*

Tenth Amendment 2, 9, 23, 24

STATUTES CITED:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

28 U.S.C. § 1343 1

42 U.S.C. § 1983 ..... 1, 7

K.S.A. 19-101 *et seq.* 25

OPINIONS BELOW

The decision of the U.S. District Court for the District of Kansas granting summary judgment to petitioners is reported as *Umbehr v. McClure, et al.*, 840 F.Supp. 837 (D.Kan. 1993). The decision of the Tenth Circuit Court of Appeals, reversing the grant of summary judgment to petitioners in part and remanding the case for further proceedings against petitioners in their official capacities is published as *Umbehr v. McClure, et al.*, 44 F.3d 876 (10th Cir. 1995). Parallel proceedings in state court between the same parties have resulted in two published decisions: see *Umbehr v. Board of Wabaunsee County Commissioners*, 825 P.2d 1160, 16 Kan.App.2d 512 (1992) and *Umbehr v. Board of Wabaunsee County Commissioners*, 843 P.2d 176, 252 Kan. 30 (1992).

STATEMENT OF JURISDICTION

Original jurisdiction in the U.S. District Court for the District of Kansas was based upon 28 U.S.C. §§ 1331 and 1343, and 42 U.S.C. § 1983. Respondent prosecuted a timely appeal to the Tenth Circuit Court of Appeals under the authority of 28 U.S.C. § 1291. This Court has jurisdiction to review the decision of the Tenth Circuit Court of Appeals under 28 U.S.C. § 1254(1).

The judgment of the Tenth Circuit Court of Appeals was entered on January 4, 1995. A petition for rehearing was denied on February 10, 1995.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Amendment 1:

FREEDOM OF RELIGION, SPEECH AND PRESS

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution Amendment 10:

RESERVATION OF POWERS TO STATES

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATEMENT OF THE CASE

The named petitioners are two members of the three-person Board of County Commissioners of Wabaunsee County, Kansas, a sparsely populated county in east central Kansas. Petitioners are nominal parties, defending only in their official capacities as representatives of the people of the county. Although claims were made against them as individuals, they were granted summary judgment on the basis of qualified immunity. All claims against Petitioners as individuals were resolved by this Court's refusal to grant the Cross-Petition for Certiorari on the qualified immunity issue. (Joint Appendix p.38).

Respondent Keen Umbehr operated the municipal trash collection service for residents of six towns in the county under a contract negotiated through the Board of County Commissioners. Although no county refuse was collected under the contract, the county was a party to the agreement because its landfill was the expected ultimate resting place for the trash. (Joint Appendix p.22).

Under the contract those towns which elected to participate would pay fees to Mr. Umbehr, and Mr. Umbehr would pay landfill charges for using the county dump. Each town agreed not to do business with any competing trash hauler. The contract was renewable annually, with an option for any party to terminate with 60 days' prior notice. (Joint Appendix p.22). The contract gave Mr. Umbehr the right but not the duty to dispose of the collected refuse at the landfill owned by the county, in return for his agreement to pay landfill charges under a schedule fixed by the county. The contract provided for termination for cause and included as cause the nonpayment of fees for depositing refuse at the county landfill. (Deposition Exhibit 3, pp. 138-152 of Supplemental Appendix to 10th Cir. Brief of Appellee).

In early 1989 the Wabaunsee County Commission began discussing the need to raise landfill rates. The possibility of a rate hike was raised due to the feared impact of new environmental protection regulations, which were expected to impose requirements for potentially costly monitoring of pollution levels and more expensive methods of handling waste at the landfill. The expected costs were believed to be so great that the county might be compelled to close the landfill altogether and to send refuse generated in the county to a regional

landfill some distance away. (Deposition Exhibit 27, pp. 167-168 of Supplemental Appendix to 10th Cir. Brief of Appellee).

Mr. Umbehr appeared at County Commission meetings and spoke against a general increase of user fees and any move to close the county landfill, which would have increased his own operating costs. Mr. Umbehr stated that he preferred increased fees to be paid out of other existing funds or through tax increases. (Deposition Exhibits 27, 28, and 31, pp. 167-170A of Supplemental Appendix to 10th Cir. Brief of Appellee). Mr. Umbehr was sufficiently concerned about this and other issues that he declared himself a candidate for an upcoming vacancy on the Board. (Umbehr contested the bid of Commissioner McClure for re-election.) (Deposition Exhibits 25 and 33, pp. 166 and 171 of Supplemental Appendix to 10th Cir. Brief of Appellee).

During the course of his campaign Mr. Umbehr made public comments, both in and out of print, criticizing the individual members of the Board of County Commissioners. As a result of some of his criticisms the official conduct of the members of the Board was investigated by the Kansas Attorney General. On December 29, 1989 the Attorney General reported the result of his investigation, which included an express finding that no member of the Board of County Commissioners had engaged in any misconduct. (Deposition Exhibit 10, pp. 157-159 of Supplemental Appendix to 10th Cir. Brief of Appellee).

In February, 1990 the Board voted 2-1 to terminate Mr. Umbehr's trash collection contract. Commissioner McClure voted against termination. Because notice of

termination was not given properly, the contract renewed automatically for another year. (Joint Appendix p. 13).

In April, 1990 the Board voted to raise the rates for all landfill users, including Umbehr, effective June 1. (Deposition Exhibit 39, pp. 172-173 of Supplemental Appendix to 10th Cir. Brief of Appellee). Mr. Umbehr refused to pay the increased rates and filed both an appeal and a civil action in the District Court of Wabaunsee County, Kansas seeking an injunction against the rate hike. (Deposition Exh. 69, pp. 178-181, and pp. 3-87 of Supplemental Appendix to 10th Cir. Brief of Appellee). This litigation was unsuccessful, and ultimately resulted in published decisions on appeal in the Kansas courts. See *Umbehr v. Board of Wabaunsee County Commissioners*, 825 P.2d 1160, 16 Kan.App.2d 512 (1992) and *Umbehr v. Board of Wabaunsee County Commissioners*, 843 P.2d 176, 252 Kan. 30 (1992).

The Kansas Supreme Court ultimately held in the parallel proceedings that Umbehr had no right to appeal from the decision to raise the landfill rates absent proof of a violation of his constitutional rights or oppressive conduct. Their opinion noted that Mr. Umbehr had never alleged in those proceedings that his constitutional rights were violated by the decision to raise the rates for using the landfill. According to that opinion any decision by the Board which Mr. Umbehr could prove violated his constitutional rights would be set aside in a timely appeal. See 252 Kan. at pp.36-38.

Both Umbehr and McClure failed in their 1990 election bids, losing to a third candidate, Steven Anderson. Mr. Umbehr's public criticisms of the Board members

ceased after the election. (Petition for Writ of Certiorari, p. 9).

The question of terminating the municipal trash hauling contract was again debated in January, 1991. Commissioners Spencer and Heiser voted to terminate, and Commissioner Anderson voted nay. (Joint Appendix p. 13). Mr. Umbehr promptly negotiated exclusive contracts with five of the six participating towns, with higher rates payable to him. Mr. Umbehr made no attempt to appeal the board's decision to terminate the contract as he had done from the rate hike. (Deposition Exhibits 78-82, pp. 182-222 of Supplemental Appendix to 10th Cir. Brief of Appellee).

At the time the vote was taken Mr. Umbehr had been in default in the payment of landfill charges for over six months. (Pp. 51-55 of Supplemental Appendix of Appellee). His default was not stated to be a motivating factor in the votes of the Board members, however. The reason for termination stated at the time was a desire to remove the county from the entanglement of a contract from which it received no benefit. (Depositions of Glen Heiser and George Spencer, pp. 323-373 and 492-516, Supplemental Appendix to 10th Cir. Brief of Appellee).

Throughout the state court appeal Mr. Umbehr had refused to pay the increased fees mandated in the spring of 1990. On July 25, 1991, an order of the District Court of Wabaunsee County prohibited Umbehr from continuing to use the landfill until the delinquent payments were made. In August, 1991, Mr. Umbehr paid the overdue user fees for the period from June, 1990 to May, 1991. (Pp.

51-55 and 85 of Supplemental Appendix to 10th Cir. Brief of Appellee).

The present action was filed in the U.S. District Court for the District of Kansas on May 15, 1991, alleging that the decision to terminate Mr. Umbehr's monopoly trash hauling contract on January 28, 1991 was a violation of his First Amendment rights. Mr. Umbehr sued the three County Commissioners who held office in 1990 when the original decision was made to terminate his contract, even though only two of them had voted for termination. He did not sue Commissioner Anderson. (Joint Appendix p.1).

A summary judgment motion was filed on behalf of all defendants on December 16, 1991. Summary judgment was granted on December 30, 1993. The District Court held that all claims against the defendants in their official capacities were barred because independent contractors are not entitled to the same protection as employees under the First Amendment. The claims against all defendants in their individual capacities were also found to be barred by the application of qualified immunity. The claims against defendant McClure were found to be additionally barred because he had never voted to terminate the contract. The District Court reasoned that the termination at will of a public contract could not, as a matter of law, give rise to a claim for money damages under 42 U.S.C. § 1983, because public contracts are not analogous to employment relationships and because the economic injury claimed by Mr. Umbehr was too remote. (Joint Appendix pp. 1, 3-4, 10-20).

On review the Tenth Circuit Court of Appeals affirmed the decision with respect to all three defendants in their individual capacities, but reversed with respect to the official capacity claims. The Tenth Circuit disagreed with the reasoning of other circuits which had already ruled on the same issue, concluding that independent contractors are entitled to relief for the retaliatory termination of at-will contractual relationships, so long as some potential economic benefit to the contractor, no matter how indirectly occasioned, is lost due to the termination. In so holding the Tenth Circuit opinion expressly noted that its conclusion was "squarely in conflict with several other circuits, a posture we do not adopt lightly." The opinion further noted the view of the panel that the issue is one in which Supreme Court guidance is particularly needed. (Joint Appendix pp. 21-38).

Petitioners' motion for rehearing was denied and a timely Petition for Writ of Certiorari was filed and granted. (Joint Appendix pp. 8-9).

SUMMARY OF ARGUMENT

Pickering v. Board of Education of Township High School District, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) and its progeny recognize the legitimate right of government agencies to control their own operations for the purpose of assuring effective and efficient service to the public. Part of that right of control must be the power to delegate the task of delivering those services to private persons without losing control altogether. Because independent contractors are not subject to direct control in the

same way as an employee, the right of control must include the power to revoke such a delegation with impunity. Any limitation on the right to terminate the delegation of government responsibilities to an independent contractor is a complete denial of the right of control, rather than a restraint justified by balancing the right of control against First Amendment rights.

The decision to regain control of previously delegated government operations is inherently a policy decision which is legislative in nature, deserving of full legislative immunity. Such policy decisions will inevitably be based on political considerations, and should not be scrutinized by the courts. Allegations of improper motive are legally irrelevant to the assessment of the constitutionality of any exercise of legislative authority. Retaliatory intent should thus not invalidate the policy decision to transfer direct responsibility for services back to the government from an independent contractor.

The decision of any government agency to regain direct control and supervision over government services which have previously been delegated to private contractors is presumptively reasonable and politically debatable, and must therefore be subject to ultimate control by the people as voters. Any attempt by the courts to interfere with the discretion of a unit of government to exercise control over the details of the performance of its own services, in preference to leaving control of those functions in the hands of private persons who do not have the trust of the people or their elected representatives, would usurp the political power guaranteed to the people themselves by the Tenth Amendment.

The actions of government officials in deciding whether to terminate a contractual delegation of government services should be judged on an objective standard. Attacks on their personal motives should not be allowed to control the validity of their votes. Where a reasonable public official could conclude that termination of a contract serves the public interest, psychological motives should be deemed irrelevant as a matter of law. Retaliatory motive should be relevant, if at all, only after the contractor has established that no public interest was served by the termination of the contract. Even then the question of motive should be limited to suits against officials as individuals, and should have no relevance in actions against the government itself.

Independent contractors do not need a money damages remedy for retaliatory termination of their contracts. The public interest requires that the discretion to delegate or not should be exercised without fear of penalty. Where an articulable public benefit from the termination of the contract exists, the interest of the public must outweigh the private financial interest of the contractor as a matter of law. If no legitimate public benefit can be articulated, then the termination should be set aside by the courts. The contractor should not have the privilege to forego reinstatement of the contract and elect to sue for loss of profit.

ARGUMENT

1. The remedies articulated by this Court in *Pickering v. Board of Education of Township High School District*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) and its progeny should not be extended and amplified to protect the economic rights of government contractors whose services are terminable at will.

This case squarely confronts the Court with the need to determine the scope of the rights and duties of persons who provide public services through contract arrangements with local government, rather than serving directly as governmental employees. This Court has not previously decided whether the free speech protections afforded to governmental employees will be extended to persons who provide services to the public less directly, as non-employee contractors.

The Court should now decide that the policies underlying its decisions limiting the rights of public employees apply with even greater force where the relationship is one of principal and independent contractor. Because the only means available to exert control over the actions of an independent contractor is to terminate the contract, any restraint on the right of termination would destroy the government's right to control the public services performed under the contract.

The decision of the Tenth Circuit Court of Appeals must not be allowed to stand. The Tenth Circuit Court of Appeals has decided that the federal courts should give legal protection to the profits of those who provide public services as non-employees, no matter how tenuous the

contractual relationship with the government may be and without regard to the unqualified contractual right of the government to terminate the relationship at will. The Tenth Circuit Court of Appeals has imposed on local units of government an obligation to avoid economic injury to government contractors whose statements on issues of public concern may have irritated public administrators, even if the clearly expressed will of the people demands otherwise.

This Court has never construed the Constitution to provide a guarantee of continued profit at public expense to persons who exercise their free speech rights. Neither public employees nor persons who otherwise profit from the performance of public service have been allowed to tie the hands of responsible government officials exercising reasonable control over the delivery of government services. This Court's decisions have always recognized the right of responsible public officials to take the steps necessary to maintain effective control over those who perform the basic work of government. There is no reason to back away from these precedents now.

A Review of Prior Decisions

A substantial body of case law has developed to establish the rights of public employees to express themselves freely on matters of public concern. This Court has recognized the practical necessity of some limitation on the work-related speech of government employees in order to assure the orderly operation of governmental functions. The relative rights and responsibilities of the government employer and government employee have

been articulated in a series of cases spanning more than twenty-five years: See, for example, *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980); *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983); *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990); *Waters v. Churchill*, 511 U.S. ___, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994); *United States v. National Treasury Employees Union*, ___ U.S. ___, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995). These cases hold that free speech rights of government employees may properly be subjected to limitations which could not permissibly be applied to the general public. Even express prior restraints, and not just *post hoc* sanctions, may sometimes be justified under the *Pickering* balancing test. See *Civil Service Commission v. Letter Carriers*, 413 U.S. 548, 546, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973) and discussion in *National Treasury Employees* at 130 L.Ed.2d p.980.

One overriding concern in such cases is avoiding the creation of a constitutional right of employee tenure. The Court has afforded wronged employees only those remedies which are necessary to place them in no better and no worse a position than they would have been in had the protected comments never occurred. See *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 2[illegible] 97 S.Ct. 568, 50 L.Ed.2d 471 (1977).

This court has struggled with the proper application of the First Amendment to political patronage practices. From *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) to *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980) to *United States v.*

National Treasury Employees Union, supra, there has been dissension among the members of the court concerning the extent to which the First Amendment should be hostile to the practice of providing special employment favors to the political supporters of those in power. Most recently in *U.S. v. National Treasury Employees Union, supra.*, it was suggested that the conflict might be resolved by the application of different standards of scrutiny to cases involving political patronage, especially those involving potential prior restraint, versus disciplinary actions taken against individual employees based on after the fact determinations. See discussion at 130 L.Ed.2d p.979 *et seq.*, compared with the comments of Justice O'Connor in her opinion concurring in part and dissenting in part at 130 L.Ed.2d pp. 988 *et seq.*

The members of this court have not been in full agreement concerning the test to be applied when a government employer expressly regulates the content of its employees' speech. Some members of the Court have strongly suggested that the historical standard applied in such cases is more lenient than the constitutional standard applicable to restraints on the speech of members of the general public. See *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990), dissenting opinion of Justice Scalia at 497 U.S. pp. 98-102 (joined by the Chief Justice and Justices Kennedy and O'Connor). It was there noted that this court's decisions consistently follow the standard laid down in *Public Workers v. Mitchell*, 330 U.S. 75, 97 S.Ct. 556, 91 L.Ed. 754 (1947), requiring only a reasonable conclusion that the regulation would enhance the efficiency of the government's provision of services. The majority opinion in *Rutan* concluded

that blatant political patronage did not meet the constitutional test, whether it is phrased in these terms or in stronger language.

Whatever the resolution of the ongoing dispute concerning the standard for review of patronage practices may be, that dispute need not in any way affect the court's decision in this case. Cases which involve neither prior restraint nor political patronage should be governed by the more lenient standard of review originally stated in *Pickering*. There has never been any suggestion that Mr. Umbehr's contract was terminated so that he could be replaced with a political ally. His contract remained in place for many years despite his lack of political affiliation with petitioners or their supporters. The purported retaliation occurred after he made his public comments, without prior restraint. The dispute between the majority and the dissenters in *Rutan* therefore should not be a source of division here.

In the cases discussed in the dissenting opinion in *Rutan, supra,* the balancing to be performed by the court is not to weigh the personal interests of the worker against the alleged improper motives of his superiors. Instead the test balances the interest of the public in assuring discourse on a matter of public concern against the public's competing interest in seeing that the services entrusted to the employing agency are performed effectively and efficiently. It was expressly noted, for example, in *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) that not all of the employee's First Amendment rights are relevant, but that only discourse on matters of public concern should be considered. *Connick* concluded that employee communications which

relate solely to personal concerns or workplace conditions cannot provide a basis for objecting to sanctions imposed by the employer, even though the comments would be protected by the First Amendment if they were made outside the employer/employee relationship. See 461 U.S. at p. 147. If the comments relate to the desires of the employee for different working conditions than the employer wishes to provide, discipline may be imposed without any need for constitutional justification. See 461 U.S. at pp. 148-149.

Even if the test of *Pickering* is not applied to any relationship except that of employer and employee, a similarly relaxed standard of review would apply to decisions which are content neutral and which only incidentally burden speech. A standard only slightly different from the *Pickering* balancing test has traditionally been applied to government actions which happen to result in a restriction of free speech but are not primarily intended to do so. This court repeatedly has held that persons who engage in activities protected by the First Amendment do not thereby become automatically immune to all adverse action by agencies of government. The fact that enforcement of the law will have the incidental effect of inhibiting or even precluding the complaining party's First Amendment activities does not by itself permit the courts to nullify otherwise legitimate exercises of government power. Examples of permissible incidental effects can be found in numerous decisions, including *United States v. Albertini*, 472 U.S. 675, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985); *Wayte v. United States*, 470 U.S. 598, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 106 S.Ct. 3172, 92 L.Ed.2d 568 (1986); *Ward v. Rock*

Against Racism, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989); *F.T.C. v. Superior Court Trial Lawyers Association*, 493 U.S. 411, 110 S.Ct. 768, 107 L.Ed.2d 851 (1990); *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990); *Cohen v. Cowles Media Co.*, 501 U.S. 663, 111 S.Ct. 2513, 115 L.Ed.2d 586 (1991); and *Alexander v. United States*, 509 U.S. ___, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993)

Independent Contractor vs. Employee

Assuming arguendo that a higher standard applies to broad regulations which imposing express prior restraints on the political speech of civil servants as a whole, application of that standard cannot be justified where complaint is made by an independent contractor to whom the performance of some part of the government's responsibility to its citizens has been delegated.

If independent contractors are allowed to prevent the cancellation of their contracts so long as they publicly criticize the public officials who control the decision to cancel or not, the public services they perform will be placed beyond any regulation or restraint. If criticism of a government decisionmaker prevents public control over government services, the result will not be the elimination of wrongs but the grant of property rights. The independent contractor would have greater rights as a result of his comments, contrary to the rule of *Mt. Healthy, supra*, if objectionable speech could create tenure.

The rule of *Pickering* would be stood on its head if an independent contractor could obtain greater First Amendment protection by seeking to compare himself to

an employee, since employees have less protection than the general public, not more. Because of the special rules limiting control over the operations of independent contractors, their rights should be even more limited than those of employees.

The relationship between an employer and an employee differs significantly from the relationship between a principal and an independent contractor. An employee is hired to render a service without a guarantee of results. In exchange for relief from the burden of guaranteeing a result, the employee gives up control over the day to day operations on the job. Employers maintain day to day control of the details of the manner in which the work is performed by employees.

When the public is dissatisfied with the quality of services performed by employees, they need only make the fact known to the elected representatives who wield authority over those employees. An effective response can be assured without delay. The employee is legally obligated to obey corrective directions from higher up.

Government control of the performance of public services is heavily impaired when the job is delegated to a private contractor. Where a task has been delegated to an independent contractor, the contractor exercises the right to control the details on a daily basis. By delegating public services to an independent contractor the government temporarily loses direct control over the performance of the services and retains only the ultimate right to terminate the relationship.

Although a government agency may entrust part of its operations to an independent contractor, it does not

also delegate the ultimate responsibility for the service. The people remain entitled to look to the government when they are dissatisfied with those services, and to demand changes if the service is inadequate for any reason. But the government cannot issue orders directly to the independent contractor or his employees to change the manner in which the service is performed. Control is exercised only indirectly, by threatening the termination of the contract if the contractor will not voluntarily correct the objectionable practice.

Where the relationship between the parties is one of principal and contractor, there is no flexibility available when it becomes advisable to redistribute the relative powers and responsibilities of the parties. If the principal decides that greater control is required, the contract must be terminated. A new and different contract, perhaps a contract of employment, may thereafter be negotiated between the same parties. But before such a contract can be negotiated, the old relationship that denies a right of control to the principal must be abolished.

In the factual context presented here, the difference between an employee and an independent contractor is highly significant. Because Mr. Umbehr was an independent contractor and not an employee, he was free to decide how many trucks to operate, how many employees to hire, what wages to pay, the schedules to be followed in collecting trash from residential customers, and the means of disposing of the accumulated refuse.

As an independent contractor Mr. Umbehr ran the risk of failing to make a profit if his decisions on these subjects were unwise. Because Mr. Umbehr's contract

gave him discretion over methods and procedures, he was free to increase his personal profit by devising more efficient methods for the performance of the service.

Because his contract did not obligate him to use the county landfill, but merely guaranteed him the privilege to use it if he elected to do so, Mr. Umbehr was free to find a more profitable disposal site elsewhere, if he so desired. Because there was no guarantee that the trash hauled by Mr. Umbehr's trucks would be deposited at the county landfill, the Board had no assurance that revenue from that source could be used to finance its operations. Continuation of the existing contract therefore undermined the county's ability to plan for the future of its citizens' waste disposal needs.

Had Mr. Umbehr been an employee he would merely have had supervisory authority over subordinate staff whose activities were ultimately controlled, even in slight detail, by the Board of County Commissioners. The Board and not Mr. Umbehr would have decided how many trucks to operate, the schedules for trash pickup, and the ultimate destination of the collected refuse. The risk of adopting different means and methods would have fallen on the County, not on Mr. Umbehr. Control of those means and methods would also have remained with the county, however.

As an independent contractor Mr. Umbehr had a potential conflict of interest with the people of the County. If there was any opportunity to increase his profit margin by having the citizens subsidize the cost of using the county landfill, he was motivated to work

toward that end rather than absorb additional costs himself. That conflict became real when the question of increasing user fees became a subject of debate before the County Commission. Mr. Umbehr yielded to the conflict and spoke out in favor of an increase in taxes, rather than an increase in user fees, to pay mounting costs for operating the landfill.

So long as Mr. Umbehr's contract remained in place, Petitioners were not free to make ultimate policy decisions concerning the wisdom of maintaining a county landfill. For example they were not free to close the landfill altogether, since to do so would be a breach of the contractual provision guaranteeing Mr. Umbehr access to the site. Similarly, the Board of County Commissioners was not free to decide that the landfill would accept only certain types of refuse, or only limited volumes.

In order to regain control over the long term planning for the use of the landfill, the Board of Wabaunsee County Commissioners was required to relieve itself of the contractual obligation to continue to operate the landfill in a manner consistent with Mr. Umbehr's chosen operating methods. Only upon termination of the contract could the county again become free to decide how to operate the landfill, and free to decide to close it altogether if public health, safety and welfare required that result.

All of these decisions would have remained under the control of the Board of Wabaunsee County Commissioners if Mr. Umbehr had been employed as a supervisor of a government department entrusted with the same

tasks, rather than operating under an independent contract. They would have retained the right to abolish his position in anticipation of the closing of the county landfill. Had he been an employee he could have been fired for insubordination for the remarks he made in county commission meetings, despite the public interest in the issues at stake, under the balancing test of *Pickering*.

The same considerations that apply to reassertion of control over government services may not apply to retaliatory acts against persons who are not performing services for the public as a surrogate for the government, but are merely regulated by the government along with others doing similar work. Nor do they apply in the same manner where the contract is terminated solely in order to reassign it to a political supporter. Although the legal relationship between a friendly contractor and an unfriendly one is the same, the likelihood that objectionable practices will be corrected in response to polite advice is greatly increased where the contractor is a political ally. Political strife may therefore be indirectly relevant in assessing the need for a reassertion of direct government control. Where political differences prevent the amicable resolution of public complaints about the contractor's services, termination may be the most effective means of assuring proper service to the public.

The discussion in the decision of the Tenth Circuit Court of Appeals in this case, as well as the discussion in the opinions from other Circuits noted by the Tenth Circuit, overlooks the considerations outlined above. Because *Pickering* expressly requires a balancing of the government's need for control against the First Amendment's guarantee of free and open discussion of matters

of public concern, the analysis set forth above is much more relevant than some of the reasoning in the conflicting opinions of the various Circuit Courts of Appeal. The degree of financial dependence of the contractor or the similarity of the dispute to a workplace grievance, for example, simply have no bearing on the weight to be given to the government's right to control the performance of its own services to the public. If this right of control is ignored it is not possible to perform the *Pickering* balancing test rationally. If the right of control is considered it is difficult to imagine a circumstance where the contractor's right to speak would prevail over the government's right to assert control over its own operations.

A *Per Se* Rule for Independent Contractors

The First Amendment cannot reasonably be construed to require the delegation of governmental powers to private citizens who have outspokenly criticized public decision makers merely because the decision to do otherwise would result in economic loss to them. If a legal right to compensation for economic loss resulting from a political decision to change the distribution of authority over local services is granted to all persons who vocally oppose that political decision, the inevitable result will be a wholesale transfer of power from elected representatives and their duly appointed administrators to the courts. This result not only is not compelled by the First Amendment, it is prohibited by the Tenth.

The Tenth Amendment is not a dead letter. It was applied very recently to guarantee the political rights of

the people of the several states to have unfettered control over the identity of their elected representatives. See *U.S. Term Limits, Inc. v. Thornton*,___U.S.___, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995). In that case the efforts of a state legislature to place limits on the right of constitutionally qualified candidates to run for national office were struck down as an improper interference with the Tenth Amendment guarantee that the people themselves exercise the power to choose their representatives.

It is questionable whether the Board of County Commissioners would have had the authority to agree to an irrevocable delegation of control of refuse disposal operations to Mr. Umbehr. Any attempt to do so would have cut off the people's right to control local government. Certainly the United States Constitution does not give the federal courts control over local trash service. When the people refused to elect Mr. Umbehr to the Board and instead elected representatives who chose to terminate his authority over basic local services they exercised their constitutionally guaranteed rights. Neither Mr. Umbehr nor the courts have any right to divest the people of that right of control, either to keep power in his hands or to deliver it into the hands of a judge or jury.

If the refusal of the people to elect Mr. Umbehr to a position of official authority is not recognized as an exercise of constitutionally protected authority, then the Board's independent decision to cancel the contract should be recognized in its own right. When the board terminated the trash hauling contract it made a policy decision on behalf of the people, if that decision was not yet made clearly enough. Under Kansas law the Board performs all of the county's executive and legislative

functions, and exercises some quasi-judicial authority as well. Under Kansas law counties have sovereign authority within their own borders, subject only to the state constitution and some limited control by the state legislature, under a system known as home rule. See *State ex rel. Stephan v. Board of Sedgwick County Commissioners*, 770 P.2d 455, 244 Kan. 536 (1989) and K.S.A. 19-101 *et seq.* Both the District Court and the Court of Appeals recognized that the application of legislative immunity to the Board's actions was a "close question". See Joint Appendix at pp. 14, 38. The question should not be a close one. The vote to terminate was a clear exercise of discretionary sovereign power, with which the courts should not interfere.

Under the doctrine of legislative immunity no liability attaches for votes on legislative issues, even if the votes are cast with a malicious intent to cause harm. See *Tenney v. Brandhove*, 341 U.S. 367, 95 L.Ed. 1019, 71 S.Ct. 783 (1951). Legislative immunity applies to state and local officials acting in a legislative capacity. See *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 59 L.Ed.2d 401, 99 S.Ct. 1171 (1979) and *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 64 L.Ed.2d 641, 100 S.Ct. 1967 (1980).

The same policy considerations which support absolute immunity for legislative votes should apply to prevent judicial interference with the decision to perform government functions directly, through contractors, or even to forego providing them at all. These decisions go directly to the basic policy choices of big budgets versus small ones, big government versus small government, big bureaucracy versus privatization, which cannot be

decided in the courts. Because decisions of this nature may depend upon unforeseeable practical and political considerations, they must remain reversible if it appears that a mistake has been made or if circumstances change. The political process is far better suited to make these decisions and readjustments than the courts.

2. The tests of *Pickering* and its progeny must be reformulated or redescribed to fit the circumstances of an independent contractor, if the rule of *Pickering* is to be extended.

If the Court does not categorically reject all claims by government contractors, it should adopt the least stringent rule compatible with the right of the people to control the operations of government, rather than transferring control to private interests or the courts. Where no prior restraint is involved and no express attempt to regulate any speech is apparent, the least stringent test of constitutional limitation is obviously appropriate. That test can be applied without inquiry into the personal motives of the public officials responsible for the questioned decision. The courts should not assess the relative interests of the parties on a case by case basis, other than to look for a rational basis which justifies the incidental restraint on free speech.

Whether the same test is applied to all contract cancellations or not, there surely is no need to impose a stricter standard of scrutiny where an independent contractor complains of economic injury than is applied to claims by members of the general public for injuries of the same kind.

The rule applicable to alleged infringement of the rights of the general population requires only that an incidental restraint on freedom of speech be no greater than is reasonably necessary to achieve the public purposes unrelated to regulation of speech which afford a general justification for the government's actions. See *Turner Broadcasting System v. F.C.C.*, 512 U.S. ___, 114 S.Ct. 2445, 129 L.Ed.2d 497, especially the discussion at 129 L.Ed.2d pp. 530-531. A governmental employer is allowed somewhat greater discretion and power in the control of the actions of its own employees than would be allowed under *Turner Broadcasting*, whether the employer expressly seeks to impose a prior restraint or whether disciplinary action is imposed after the fact. Certainly where no content-based prior restraint is involved, neither an employee nor a member of the general public can demand that the needs of the public take a back seat under either test.

Even where blatant political patronage or prior restraint may be alleged, this Court must be extremely cautious in opening the courthouse door to profitseekers whose real purpose is to avoid the legitimate result of public debates and elections. Only political opponents of public officials will have standing to sue for alleged retaliation, if such suits are allowed, because only they will have done anything to invoke First Amendment protection. No matter how beautifully crafted this Court's rule of decision might be, that rule will only be applied when the parties are in court. Small units of government can rarely afford to litigate a case like this far enough to get a favorable decision on the merits. They are strongly motivated to yield to the demands of potential plaintiffs to

avoid expenses. Any rule of law which requires much more than a motion to dismiss on the pleadings to defend against this sort of abuse will fail its essential purpose.

There is no constitutional policy which would justify favoring political enemies over political friends in government contracting. If the Constitution recognizes little or no value in awarding spoils to the electoral victors, it must also recognize even less value in providing court ordered spoils to the losers at the polls. If no public purpose is served by having elected officials appoint their political friends to lower offices, then neither is there any public purpose to be served by requiring them to appoint their political opponents. Complaints by disgruntled losers must be recognized as the self-interested, anti-democratic, profit-motivated ploys that they really are, and not as the public-spirited defense of basic liberties that they pretend to be.

If government contractors are to be given the right to sue for termination of their rights under some circumstance, the triggering event should not be the existence of a retaliatory motive engendered by harsh political debate. To do so would inspire contrived conflicts with political opponents for the sole purpose of generating a factual basis for lawsuits. Such contrived conflicts would provide disgruntled contractors with leverage to coerce favorable decisions from their political opponents to avoid litigation. Such political blackmail must not be encouraged. Whatever rule is adopted, the risk of such blackmail must be avoided by requiring a significantly higher initial burden of pleading and proof than the establishment of personal conflicts between the parties.

Eliminating consideration of alleged retaliatory motive is also favored by separate policy considerations. This Court has decided as a matter of public policy to protect government officials from burdensome and harassing inquiries into their personal thought processes in the context of qualified immunity. The alleged presence of a retaliatory motive cannot defeat a claim of qualified privilege. In *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L.Ed.2d 396, 102 S.Ct. 2727 (1982) this Court recognized that earlier qualified immunity cases had allowed the imposition of liability where the defendant acted with the malicious intention to cause a deprivation of constitutional rights. See discussion at 457 U.S. pp. 815-818, where the so-called "subjective element" was rejected and the test of qualified immunity was reduced to a solely objective standard. *Harlow* also specifically noted that the doctrine of qualified immunity is available in addition to, and not as an alternative to, other recognized doctrines of absolute immunity. See 457 U.S. at p. 818, footnote 30.

The subjective element of the qualified immunity test was removed for the stated reason that it was undermining the intended purpose of the qualified immunity doctrine, the resolution of insubstantial claims at or before summary judgment. The *Harlow* opinion specifically disallowed discovery concerning the intent of the individual defendants until the threshold question of the objective state of the law had been determined. See discussion at 457 U.S. 818. The recognition of a right to sue whenever an alleged retaliatory motive taints an otherwise legitimate decision to terminate a government contract would undermine the goals of the *Harlow* decision.

Adopting any principle of judicial suspicion toward termination of contracts with vocal political opponents would threaten to convert far too many of the daily decisions of local government into lawsuits. The courts do not have the resources to decide petty political disputes over contracts for everything from street cleaning to vending machines to trash disposal, even if the Constitution permitted it. Not only does the Constitution not mandate such micromanagement, it prohibits it. Votes at the polls, not in the jury room, must ultimately decide these mundane affairs. If all of these matters were subject to resolution in the courts, there would be no purpose in having a public debate. Only the judge and jury would decide what to do, so only they would need to be informed of the pros and cons on any issue.

State and local units of government need to have at least as much freedom and discretion to regulate the means employed in providing services to the general public as the courts allow to federal agencies. As the politically motivated process of downsizing and decentralizing government continues, more and more of the important functions of government will be performed at the state or local level. The change of geographical location of the responsibility for performing such services should not increase the degree to which the courts are prepared to intervene in government administrative decisions.

Every government decision to enter into or to terminate a contract with a private service provider is a potential subject for public debate protected under the First Amendment. Every decision whether or not to delegate some part of the responsibilities of government, every

decision to have the government stop performing a particular service altogether, and every decision to spend public funds can lawfully be opposed in public debate. Every decision to reverse a prior decision on these same matters is equally debatable. If the mere fact of opposition, coupled by a decision contrary to the expressed wishes of opponents of the policy ultimately adopted, can transfer to the courts the ultimate decision on matters of public policy, then the First Amendment will have been converted into a mechanism for the dismantling of all units of state and local government and the transfer of their powers to the federal courts. Every political debate will be converted into a court case, unless this Court recognizes that the losers of such debates must simply live with the economic consequences inherent in public policy decisions rather than suing for damages.

The First Amendment does not guarantee the right of any citizen to control political decisions. Neither does the First Amendment guarantee to individuals the right to operate public agencies for their personal profit. Instead the First Amendment contemplates the full and fair public debate of matters of public concern, including the appropriate means for performance of public services, followed by a decision by the peoples' elected representatives determining the correct policy to follow.

It is an inherent part of the process contemplated by the First Amendment that the policy ultimately chosen will have been opposed by a minority. In many instances the opposition will have been motivated in part by an expectation of financial gain or loss to the advocates on

either side of the issue. The existence of a potential financial gain or loss cannot be allowed to convert an ordinary political decision into a constitutional wrong.

In any debate over matters of public concern it is not only expected but appropriate for the decision maker to consider public statements both for and against the policy ultimately adopted. The fact that an opponent's arguments have been considered and rejected cannot be allowed to convert the adverse decision into an unlawful act of retaliation which guarantees financial compensation to the political loser.

3. If independent contractors are to be given the same protections as employees under *Pickering*, at least the affirmative defenses now available to employers must remain available to the contracting agency.

A number of defenses have been recognized to apply to claims of employees for wrongful termination. All of these defenses, without exception, should be available to a government agency accused of wrongfully terminating an independent contractor's rights.

The rule of *Connick v. Myers, supra*, that termination is always permissible in response to expressions of disagreement with workplace policies which do not implicate issues of general public concern, should apply equally to employees and contractors. Mr. Umbehr's comments relating to the use of the county landfill would qualify as personal matters under this test.

Every independent contractor should be subject to lawful termination for cause on the same grounds as an

employee. Failure to perform the agreed services competently obviously should justify termination of a contractor, just as it would justify termination of any employee, including one with contractual tenure. See *Elrod v. Burns, supra.*

This Court has held that money damages are not available to an employee from the date when the employer is aware of facts which would support a lawful termination for cause. See *McKennon v. Nashville Banner Publishing Company*, ___U.S.___, 115 S.Ct. 879, 130 L.Ed.2d 852 (1995). A similar rule should apply to the termination of an independent contract. In this case objective grounds for terminating the contract abounded, separate and apart from any attempt by Mr. Umbehr to engage in public discourse on any issue. Mr. Umbehr's continuing failure to abide by the terms of his contract and pay the lawful landfill rates, even after a final money judgment was entered against him for those amounts, were grounds for termination of the contract for cause. Although this cause was not expressly invoked at the time the Commissioners voted, it nonetheless existed and was well known to them.

Even if no objective good cause for termination exists, a government employer has the right to establish that its employee would in fact have suffered the same consequences even if no protected speech act had occurred. See *Mt. Healthy City School Dist. Bd. of Ed. v. Doyle, supra.* The same requirement of causation in fact should be recognized where the plaintiff is an independent contractor rather than an employee.

Employees whose responsibilities include policymaking may be terminated on the basis of political affiliation. See *Elrod v. Burns, supra.* An independent contractor whose responsibilities include the formulation of policy should be equally terminable without independent cause.

An employer is only required to make a reasonable investigation to determine whether First Amendment rights are at stake before taking adverse action against an employee. In *Waters v. Churchill, supra,* it was held that no liability would be imposed if the employer reasonably believed on the facts available that no First Amendment issue was presented. Contractors should also be protected only where their rights are reasonably known to the contracting agency.

In this case the lower courts have already established that the applicability of First Amendment guarantees to Mr. Umbehr's complaints was not reasonably established, thereby justifying a grant of personal immunity to them. Only a rule of strict liability for the government agency, rather than the test of reasonable appearances adopted in *Churchill,* could justify a money judgment against the government agency. As a matter of law the rule of *Churchill* should prevent the plaintiff from prevailing against the government agency on these facts.

This court has held that an action for money damages should not be implied in favor of a government employee whose First Amendment rights have been violated, when an adequate remedy already exists by way of administrative appeal or otherwise. In the case of *Bush v. Lucas,* 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983) this court

refused to give federal civil service employees the common law right to money damages because a constitutionally adequate remedy was already available to them under federal civil service regulations.

Independent contractors such as Mr. Umbehr already have a constitutionally adequate remedy by way of direct appeal in the state courts. Mr. Umbehr's own appeal in the parallel proceedings clearly established just such a right. In *Umbehr v. Board of Wabaunsee County Commissioners,* 843 P.2d 176, 252 Kan. 30 (1992) the Kansas Supreme Court held that orders of state agencies which would otherwise not be appealable could be reviewed by direct appeal if the complaining party could demonstrate either an illegal or an oppressive act. Illegal acts were defined there as procedurally irregular acts or acts beyond the scope of the government agency's authority. Oppressive acts were defined to include anything which "subjects a person to cruel or unusual hardship through misuse or abuse of authority or power or when it deprives a person of any rights, privileges, or immunities secured by our Constitution or laws." See 252 Kan. at pp. 36-37. Under Kansas law Mr. Umbehr had the right to challenge the termination of his contract as a violation of his rights under the First Amendment by way of a direct appeal. Had he established a violation of any constitutional right, or in the alternative a personal hardship inflicted through abuse of authority, the Kansas courts would have ordered his contract reinstated.

Mr. Umbehr chose to file a federal civil rights action in U.S. District Court rather than seeking any relief by way of appeal to the Kansas State Courts. He did so for the obvious reason that the new contracts with five of the

six towns previously served by him are more lucrative than the old contract. By permitting the old contract to be canceled and then suing for damages he created an opportunity to profit twice. His unilateral decision to waive the right to reinstate the contract and to seek redress in the federal courts should not create a federal remedy where there otherwise would be no need for one. Mr. Umbehr should not be allowed to waive his right to compel the continuation of the contractual relationship and instead seek money damages to be determined by a federal jury.

CONCLUSION

The analysis followed by the Tenth Circuit Court of Appeals ignores the significance of the obligations owed by an independent contractor, and focuses solely on the contractor's economic interests. It ignores the responsibilities of local government to the people, and focuses solely on the inferred intent of individual decision makers.

By ignoring these considerations, the Tenth Circuit Court of Appeals reached the absurd conclusion that the people of Wabaunsee County should pay Mr. Umbehr damages for an alleged spiteful act of their elected representatives, even though these representatives are not personally responsible for the economic harm he alleges. This result cannot and must not stand.

If the vote to terminate Mr. Umbehr's contract did not promote the health, safety and welfare of the people of Wabaunsee County, it was reviewable in state court as

an arbitrary or oppressive act. Plainly there was more than enough evidence confronting the Board of County Commissioners to determine that the people would be benefited by the termination of the contract. Any attempt to reevaluate that evidence and reach a contrary conclusion in a jury trial would be a substitution of the federal court as the sovereign authority in the county, contrary to the Tenth Amendment requirement that the people and the states retain such power.

The will of the people, clearly expressed at the polls, rejecting Mr. Umbehr as a proper person to control government policy in Wabaunsee County, cannot be overridden by resort to U.S. District Court. Nor can the people be punished for their votes by being required to pay Mr. Umbehr damages, as if they had taken from him a property interest in the trash hauling contract by reposing their trust in persons who disagreed with his policies.

The people of Wabaunsee County have wronged no one. They do not deserve to be punished simply because Mr. Umbehr may prove to the satisfaction of a court and jury that he succeeded in fomenting a personal vendetta with elected officials.

The decision of the Tenth Circuit Court of Appeals should be reversed, and the judgment of the United States District Court for the District of Kansas granting

summary judgment to Petitioners on all claims should be reinstated.

Respectfully submitted,

STEVE R. FABERT
DONALD PATTERSON
FISHER, PATTERSON, SAYLER & SMITH, L.L.P.
534 S. Kansas Avenue
Suite 400, P.O. Box 949
Topeka, Kansas 66601-0949
(913) 232-7761
Attorneys for Petitioners